IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2006-0030
	)	DEPARTMENT A
	)	
IN RE LIZBETH C.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. JV03-139D

Honorable Kimberly A. Corsaro, Judge Pro Tempore

AFFIRMED IN PART AND REVERSED IN PART

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V Á S Q U E Z, Judge.

¶1 Lizbeth C. appeals from her delinquency adjudication on two counts of assault, claiming the delinquency petition gave her insufficient notice of the charge on count one and the evidence was insufficient to support the adjudication on either count. For the reasons that follow, we affirm in part and reverse in part.

¶2 We view the evidence in the light most favorable to sustaining the adjudications of delinquency, *see In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001), which arose from an altercation between Lizbeth and a classmate, Lilian M., that took place in the parking lot of the girls' high school. The incident began with a minor traffic accident when Lilian, who testified her baby had been fathered by "[Lizbeth's] husband," maneuvered her car in front of Lizbeth's such that "[Lilian's] back bumper . . . clipped [Lizbeth's] front bumper." Both vehicles stopped. Lizbeth got out of her car and approached Lilian, who remained seated behind the wheel of her vehicle with her seat belt fastened. Words were exchanged, then Lizbeth punched Lilian one time through the open driver's side window and began walking back to her own car. Lilian got out of her car, grabbed Lizbeth by the hair, and attempted to hit her. A brief scuffle ensued until school security officers intervened. Lilian was left with a small cut above her left eye that she claimed to have sustained when Lizbeth punched her through the window of the car.

¶3 The state filed a delinquency petition, charging Lizbeth as follows:

> COUNT 1
> AGGRAVATED ASSAULT
> That the said juvenile, LIZBETH C[.] . . . committed assault while LILIAN M[.] was bound or otherwise physically restrained or while LILIAN M[.]'s capacity to resist is [sic] substantially impaired, a Class 6 Felony, in violation of A.R.S. § 13-1204(A)(11), § 13-1203 . . . .
>
> COUNT 2
> ASSAULT
> That the said juvenile, LIZBETH C[.] . . . committed assault by intentionally, knowingly or recklessly causing

> physical injury to another person, to wit: LILIAN M[.], a Class 1 Misdemeanor, in violation of A.R.S. § 13-1203(A)(1) . . . .

¶4 The crime of assault is defined in § 13-1203(A) as follows:

> A person commits assault by:
>
> 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
>
> 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
>
> 3. Knowingly touching another person with the intent to injure, insult or provoke such person.

Aggravated assault, in turn, is defined in § 13-1204(A). "A person commits aggravated assault if the person commits assault as defined in § 13-1203 under any of the . . . circumstances" enumerated in the statute, including those in § 13-1204(A)(11), the subsection Lizbeth was accused of violating in count one. Under that subsection, an assault is an aggravated assault if committed "while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired." § 13-1204(A)(11).

¶5 At the delinquency adjudication hearing, when Lizbeth attempted to introduce evidence about the scuffle that had followed the initial punch through the car window, the state objected, claiming the evidence was irrelevant because the charges against Lizbeth pertained only to the confrontation that had occurred while Lilian had remained in her car. Lizbeth's attorney argued evidence of the second altercation was critical to her defense to

both counts of delinquency charged in the petition. As her attorney had understood the petition, for both counts alleged, Lizbeth was accused of conduct constituting assault based on the infliction of physical injury in violation of § 13-1203(A)(1). Lizbeth therefore sought to introduce evidence that Lilian's eye could have been injured during the second confrontation, when Lizbeth's aggression might have been justified as self-defense.

¶6 In response, the state argued count one of the petition had cited the assault statute, § 13-1203, only generally and thereby had not limited the aggravated assault allegation to one based only on an underlying physical-injury assault committed in violation of § 13-1203(A)(1). The state reasoned that, because no specific subsection had been cited, the court could find Lizbeth responsible for aggravated assault based on *any* theory of assault supported by the evidence, including an assault not resulting in physical injury but committed, instead, by "[k]nowingly touching another person with the intent to injure, insult or provoke such person" in violation of § 13-1203(A)(3). Lizbeth then argued she had not received notice she would be called to defend a knowing-touching assault allegation and, citing *State v. Sanders*, 205 Ariz. 208, 68 P.3d 434 (App. 2003), that the state was consequently prohibited from claiming midway through the adjudication hearing that she was responsible for aggravated assault based on that type of assault. In *Sanders*, Division One of this court held that the trial court had violated the notice requirement of the Sixth Amendment of the United States Constitution when it granted the state's request, after the close of its case-in-chief, to amend a charge of assault committed by knowingly touching

another to a charge of assault committed by placing another in reasonable apprehension of imminent physical injury. *Id.* ¶ 68. Here, the court deferred ruling on any interpretation of the charge in count one, but permitted Lizbeth to present evidence concerning the second altercation that had occurred in the parking lot.

¶7 At the hearing's conclusion, the juvenile court took the case under advisement. In its subsequent written order, the court found that Lizbeth had not committed an aggravated assault under § 13-1204(A)(11). The court reasoned that, although Lilian had been seated in her car with her seat belt fastened when Lizbeth punched her, the state had failed to prove Lilian had been bound, physically restrained, or substantially impaired in her capacity to resist. *See* § 13-1204(A)(11). The court found the state had proved Lizbeth had assaulted Lilian "by knowingly touching another person with the intent to injure, insult or provoke when she punched the victim in the eye with a closed fist." Accordingly, the court adjudicated Lizbeth delinquent of what it termed the "lesser included offense of Assault, a class 3 misdemeanor, pursuant to . . . § 13-1203(A)(3)." The juvenile court also adjudicated Lizbeth delinquent on count two, pursuant to § 13-1203(A)(1), assault "causing any physical injury," a class one misdemeanor, as charged. At the disposition hearing, the juvenile court imposed a term of probation until Lizbeth's eighteenth birthday, which we note was October 2, 2006.

¶8 On appeal, Lizbeth renews the argument she made below that the delinquency petition charged her with aggravated assault based only on an underlying physical-injury

assault under § 13-1203(A)(1) and that, under *Sanders*, the juvenile court erred in permitting what amounted to a midtrial amendment of the nature of the charge. She also contends the evidence was insufficient to support her adjudication on either count because Lilian was not a credible witness. In its answering brief, the state offers virtually no substantive analysis but contends any possible error was harmless.

¶9 We find no error in the court's finding Lizbeth responsible on count two for a violation of § 13-1203(A)(1), assault causing physical injury. Lilian's credibility, like that of all the witnesses, was a matter within the exclusive province of the juvenile court, and we will not revisit that issue. *See In re David H.*, 192 Ariz. 459, ¶ 8, 967 P.2d 134, 136 (App. 1998). Reasonable evidence supports the court's finding that Lizbeth had "knowingly and recklessly" caused Lilian to suffer a physical injury. We therefore affirm her delinquency adjudication for assault pursuant to § 13-1203(A)(1). *See David H.*, 192 Ariz. 459, ¶ 3, 967 P.2d at 135 (juvenile court's ruling not disturbed on appeal unless no reasonable evidence supports factual findings).

¶10 We cannot, however, affirm the adjudication order on count one, in which the court found Lizbeth responsible for the purportedly lesser-included offense of assault committed by knowingly touching another. A lesser-included offense by definition "'must be composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one.'" *In re Jeremiah T.*, 212 Ariz. 30, ¶ 5, 126 P.3d 177, 179 (App. 2006), *quoting State v.*

Celaya, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). "'The elements test requires that commission of the greater offense always result in commission of the lesser offense.'" *Id.*, *quoting State v. Cutright*, 196 Ariz. 567, ¶ 2, 2 P.3d 657, 662 (App. 1999), *disapproved on other grounds by State v. Miranda*, 200 Ariz. 67, 22 P.3d 506 (2001). To commit an aggravated assault, one must "commit[] assault as defined in § 13-1203." § 13-1204(A). Accordingly, it is impossible to commit aggravated assault without having committed *an* assault.

¶11 However, the assault offenses described in § 13-1203's three subsections—(A)(1) (physical injury), (A)(2) (reasonable apprehension), and (A)(3) (knowingly touching)—"are not simply variants of a single, unified offense; they are different crimes." *Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d at 181, *citing Sanders*, 205 Ariz. 208, ¶ 33, 68 P.3d at 442. Consequently, as *Sanders* unequivocally stated,

> to pass muster under the Sixth Amendment, the prosecution, when charging either assault *or a greater crime that contains assault as a component* must provide more notice than simply "assault." The prosecution must also allege facts and circumstances that will alert the accused specifically to the type of assault he must prepare to defend against . . . . The prosecution cannot escape its constitutional duty to allege pertinent facts and circumstances, so in discharging this duty the prosecution must necessarily inform the defendant whether he is being charged with "physical injury" assault, "reasonable apprehension" assault, or "knowing touching" assault.

205 Ariz. 208, ¶ 48, 68 P.3d at 445 (citation omitted; emphasis added).

¶12 Juveniles, like criminal defendants, are entitled to notice of the charges against them. *David G. v. Pollard*, 207 Ariz. 308, ¶ 23, 86 P.3d 364, 369 (2004) (recognizing allegedly delinquent juveniles' entitlement to basic constitutional protections, including notice of charges). Accordingly, when a juvenile has been charged with violating only subsection (A)(1) of the assault statute, he or she may not be adjudicated delinquent for assault under subsection (A)(3) absent consent or prior notice of the state's intent to amend the charge. *Jeremiah T.*, 212 Ariz. 30, ¶ 13, 126 P.3d at 181. That is the case notwithstanding that when a juvenile has inflicted a physical injury, he or she might also have "knowingly touched" the victim. *See id.* ¶ 6 (assault under (A)(3) not lesser-included offense of assault under (A)(1) because "a person can commit either offense without necessarily committing the other").

¶13 In light of these authorities, we see no reason why the state should be excused from its obligation to specify the type of assault that forms the basis of an aggravated assault charge in a delinquency case. And, more importantly to the resolution of the issue presented here, the fulfillment of this duty is essential to the determination of whether "assault" is a lesser-included offense of the charged crime of aggravated assault. Specifically, although it is impossible to commit an aggravated assault in general without having committed *an* assault, it is *possible* to commit aggravated assault by satisfying the elements of *any one* subsection of § 13-1203 *without* necessarily satisfying the elements of the other two. Accordingly, one may not assume that *any* assault is a lesser-included offense of *any*

aggravated assault. Instead, one must look specifically at the charged offense to determine which, if any, of the offenses of assault constitutes a lesser-included offense of the crime charged.

¶14 The juvenile court here apparently adopted the state's interpretation of count one as having charged Lizbeth with aggravated assault based on any one of three alternative methods of committing an underlying assault because count one contained no citation to any subsection of § 13-1203 and no recitation of facts that might have narrowed the charge. We do not comment on whether the charge, so structured, offered the juvenile sufficient notice to support an adjudication for aggravated assault based on any underlying theory of assault. That issue is not before us because the juvenile court did not adjudicate Lizbeth delinquent of aggravated assault. It is clear that, in charging a person with assault, "[t]he prosecution may allege more than one of the[] methods [set forth in § 13-1203(A)(1), (2), and (3)] alternatively in those instances where the facts justify such charging." *Sanders*, 205 Ariz. 208, n.3, 68 P.3d at 445 n.3. That is no less true when aggravated assault is alleged.

¶15 However, even assuming the petition here adequately conveyed such alternative charging and the facts justified such a charge, Lizbeth's adjudication on count one for a lesser-included offense of assault must nevertheless be reversed. So fashioned, such an alternatives-based charge of aggravated assault inherently eliminates the possibility that *any* method of assault will satisfy the elements test for a lesser-included offense of aggravated assault. Because each method of assault defined in § 13-1203(A) is a crime with

elements that differ from the other two methods, when aggravated assault is charged alternatively under § 13-1204(A)(11), it is possible for a person to commit aggravated assault by satisfying the elements of § 13-1204(A)(11) and any one subsection of § 13-1203(A) without necessarily satisfying the others. Hence, under an alternative-charge reading of the petition here, no type of assault, including the (A)(3) assault for which Lizbeth was adjudicated delinquent, was a lesser-included offense of the delinquent act charged in count one.

¶16 Although for different reasons, reversal of Lizbeth's adjudication on count one is also required under her interpretation of the delinquency petition. Lizbeth understood the assault charge in count two to convey the specificity otherwise missing from count one on the type of aggravated assault with which the state intended to charge her in count one, that is, aggravated assault committed by intentionally, knowingly, or recklessly causing any physical injury to a bound or physically restrained victim or one whose capacity to resist was substantially impaired. If the petition is so interpreted, assault committed pursuant to § 13-1203(A)(1) *is* a lesser-included offense of the specific crime of aggravated assault with which Lizbeth was charged because it would be impossible to commit such an aggravated assault without also committing an (A)(1) assault.

¶17 Under this interpretation of the petition, by adjudicating Lizbeth delinquent of an (A)(3) assault on count one, the juvenile court, in effect, permitted the state to amend the nature of the charge against her in an untimely manner and without her consent in

violation of the Sixth Amendment and rules of procedure for the juvenile court. *See Sanders*, 205 Ariz. 208, ¶¶ 18-25, 68 P.3d at 440-41 (amendments that change legal description of elements of charged offense without defendant's consent prejudicially violate Sixth Amendment requirement to inform accused of nature of offense); Ariz. R. P. Juv. Ct. 24(B), 17B A.R.S. (authorizing juvenile court to permit preadjudication amendment of delinquency petition only on motion of a party and with sufficient time for parties to meet new allegations); Ariz. R. P. Juv. Ct. 29(D)(1) (at adjudication hearing, "charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless" juvenile consents; "charging document shall be deemed amended to conform to the evidence presented at any court proceeding"). Such amendments are presumptively and conclusively prejudicial and require reversal. *See Sanders*, 205 Ariz. 208, ¶ 20, 68 P.3d at 440.

¶18 The juvenile court's disposition orders are now moot because Lizbeth is eighteen years old. We affirm that portion of the juvenile court's order adjudicating Lizbeth delinquent on count two. We reverse her delinquency adjudication on count one.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge